83-58
No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

PHILADELPHIA LIFT TRUCK CORP.
Petitioner

v.

TAYLOR MACHINE WORKS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI-ANTI TRUST

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QUESTION PRESENTED FOR REVIEW

Whether a manufacturer of a product, who, desiring to increase its market penetration in a particular relevant geographic market, appoints a new authorized dealer to sell the manufacturer's product within that relevant geographic market, but chooses not to completely terminate as an authorized dealer that dealer theretofore authorized to sell the manufacturer's product within the subject relevant geographic market, violates Section 1 of the Sherman Act by:

(a) threatening the old dealer with complete termination of its authorized dealership unless said dealer agrees to sell the manufacturer's product thereafter to only one designated customer within the relevant geographic market, who was the old dealer's best customer, and

(b) entering into an agreement with the old dealer, which agreement restricts that dealer to selling the manufacturer's product to only the one designated customer, and to no other prior, present or prospective customer of the dealer, and

(c) permitting the newly-appointed dealer to sell to all customers in the relevant geographic market, except the one customer to whom the old dealer is permitted to sell, and

(d) enforcing the restriction against the old dealer so as to deprive it of its competitive opportunities, and

(e) enforcing the restriction against the old dealer so as to prevent consumers of the manufacturer's product from freely choosing and purchasing the product from the dealer of their choice, notwithstanding that two authorized dealers capable of selling and servicing the manufacturer's product, except for the restriction, are available to sell and

service the product within the relevant geographic market, and

(f) terminating the old dealer for violating the restriction?

PARTIES TO PROCEEDINGS IN COURTS BELOW

In The United States Court of Appeals For The Third Circuit:

Philadelphia Lift Truck Corp., *Appellant*
Taylor Machine Works, Inc., *Appellee*

In The United States District Court for the Eastern District of Pennsylvania:

Taylor Machine Works, Inc., Plaintiff and Counterdefendant
Philadelphia Lift Truck Corp., Defendant and Counterplaintiff
Samuel Fertik, Defendant and Counterplaintiff
Eleanor Fertik, Defendant and Counterplaintiff

DESIGNATION OF CORPORATE RELATIONSHIPS

Philadelphia Lift Truck Corp., filing this Petition for Certiorari-Anti Trust as Petitioner in this proceeding, states that:

A. This is its original Designation of Corporate Relationships.

B. Philadelphia Lift Truck Corp. is not owned by any parent corporation.

C. Philadelphia Lift Truck Corp. does not have an ownership interest in any subsidiaries.

D. Philadelphia Lift Truck Corp. does not have any affiliates.

DATE: July 15, 1983.

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Miscellaneous:

IN THE
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October Term, 1982 No. _____

PHILADELPHIA LIFT TRUCK CORP.
Petitioner

v.

TAYLOR MACHINE WORKS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Philadelphia Lift Truck Corp., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 22, 1983.

OPINIONS BELOW

The Judgment Order entered by the United States Court of Appeals for the Third Circuit (Appendix A, infra, 1a) on March 22, 1983, is not yet reported.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Appendix C, infra, 4a), issued orally on April 27, 1982, is not reported.

The order of the District Court (Appendix D, infra, 16a), entered on April 28, 1982, is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, 1a) was entered on March 22, 1983. A Petition for

rehearing was denied on April 19, 1983 (Appendix B, infra, 3a). The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal..."

Section 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 15, provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT

Petitioner, Philadelphia Lift Truck Corp. (hereinafter "Philadelphia Lift"), was, from February 27, 1972 to March 7, 1978, the authorized, non-exclusive dealer for the sale of and the service of Taylor heavy duty fork lift trucks and replacement parts to consumers thereof in the city of Philadelphia, Pennsylvania and seven surrounding counties in the states of Pennsylvania and New Jersey. At all times relevant hereto, Philadelphia Lift maintained a showroom, service and repair facilities in the City of Philadelphia, Pennsylvania.

Respondent, Taylor Machine Works, Inc. (hereinafter "Taylor"), is a corporation which manufactures heavy-duty fork lift trucks and replacement parts in Louisville, Mississippi. Except for various states in the southern part of the United States and for direct sales to designated national accounts, Respondent distributes its products throughout the United States through independent authorized dealers pursuant to industrial dealer agreements which provide, among other things, that each dealer is assigned an area of primary responsiblity in which the dealer has the non-exclusive right to sell Taylor products. Said agreements are subject to cancellation by Respondent upon the giving of thirty days notice. Although not a provision contained in the dealer agreement, it is Taylor's policy, made known to each authorized Taylor dealer, that any such authorized dealer is not permitted to sell heavy duty fork lift trucks manufactured by competitors of Taylor.

Taylor, in 1977 and early 1978, was a leading manufacturer of heavy duty fork lift trucks among approximately eight other such manufacturers, and its sales were growing at a spectacular rate. Taylor's products commanded a higher price than similar products of other manufacturers, and Taylor products accounted for approximately 30% of all heavy duty fork lift trucks sold in Philadelphia Lift's area of primary responsibility.

From the inception of the agreement entered into between Philadelphia Lift and Taylor, Taylor believed that Philadelphia Lift was undercapitalized. At various times throughout the period February 27, 1972 to March 7, 1978, Taylor was dissatisfied with Philadelphia Lift's sales effort and market penetration within its area of primary responsibility, and its slow payment for parts purchases from Taylor.

In early March, 1978, Taylor advised Philadelphia Lift that Taylor desired to increase its market penetration and to that end was going to appoint a new authorized dealer in the area of primary responsibility theretofore assigned to Philadelphia Lift; that Taylor was going to retain Philadelphia Lift as an authorized dealer, but that Philadelphia Lift could sell Taylor products to only one designated customer of Philadelphia Lift, being that customer who, in the two previous years, had purchased approximately 80% of Philadelphia Lift's total sales of heavy duty fork lift trucks; that Taylor was retaining Philadelphia Lift as an authorized dealer to sell Taylor products to only its theretofore best customer because of Philadelphia Lift's faithfulness to Taylor in the past and out of compassion for Philadelphia Lift; and that if Philadelphia Lift did not sign an addendum to its dealer agreement, which addendum would embody the restriction on sale of Taylor products to only the one designated customer, then its dealer agreement would be cancelled in its entirety.

Philadelphia Lift objected to the restriction, but on March 15, 1978, reluctantly signed the addendum embodying the restriction which was submitted to it by Taylor on March 7, 1978. On March 10, 1978, Taylor appointed a new authorized dealer in the area of primary responsibility theretofore assigned to Philadelphia Lift, but excepted from this geographic area the one customer to whom Philadelphia Lift was permitted to sell Taylor products. The newly-appointed dealer also maintained a showroom, service and repair facilities in the City of Philadelphia, Pennsylvania.

In late March, 1978, Philadelphia Lift was contacted by one of its customers to whom it had sold Taylor products in the prior years, for the purpose of purchasing two Taylor heavy duty fork lift trucks. Philadelphia Lift took this order, although it was not from the one customer to which Philadelphia Lift was permitted to sell Taylor products under the recently imposed restriction, and thereafter ordered the trucks from Taylor without disclosing to Taylor the customer of Philadelphia Lift to whom the trucks were being sold. Thereafter, Taylor learned that these two trucks were ordered by Philadelphia Lift for a customer other than the one designated customer and did not ship these two trucks to Philadelphia Lift for resale to its customer. Instead, Taylor advised Philadelphia Lift's customer that it should not purchase the two trucks from Philadelphia Lift because Philadelphia Lift was not the authorized dealer, and should instead purchase the trucks from Taylor's newly appointed dealer. The customer then contacted the new Taylor dealer and purchased and was shipped two similar trucks from the newly authorized dealer, at an additional cost of $6,000 to the customer.

Thereafter, in April and May, 1978, Philadelphia Lift solicited the sale of Taylor products to customers other than the one customer designated in the restriction, in violation of the restriction, and Taylor, on June 9, 1978, after receiving pressure and threats from its newly appointed distributor to terminate Philadelphia Lift completely as a Taylor dealer, terminated Philadelphia Lift as a Taylor authorized dealer.

Thereafter, Philadelphia Lift was unable to obtain new Taylor heavy duty fork lift trucks for resale, and could no longer obtain Taylor replacement parts at dealer discount prices. Further, Philadelphia Lift was thereafter unable to obtain for resale any other heavy duty fork lift truck competitive with Taylor, except for the purchase of one such truck from another manufacturer.

Statement

This case was initiated and filed by Taylor on July 12, 1979 in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity (28 U.S.C. Sec. 1332), in which Taylor Machine Works, Inc. claimed $40,014.14 from Philadelphia Lift for goods sold and delivered, and the same amount from Samuel Fertik and Eleanor Fertik, based upon their personal guarantee of the indebtedness of Philadelphia Lift.

An answer was filed by the Petitioner which admitted all of the allegations of Taylor's complaint. In this answer, a counterclaim was asserted by the Petitioner containing three counts charging violations of Section 1 of the Sherman Act (15 U.S.C., Section 1), and prayed treble damages for loss of profits.

Respondent Taylor filed an answer to the counterclaim in which it denied all of the alleged violations of the Sherman Act.

The District Court ordered that the trial of the case be bifurcated, with the liability issues on the antitrust counterclaim to be heard prior to the issue of damages claimed in the counterclaim. Thereafter, on April 19, 1982, the case came on for bench trial before the Honorable Norma L. Shapiro, Judge of the United States District Court for the Eastern District of Pennsylvania. After four days of trial, the District Court, on April 27, 1982, issued its opinion from the bench, which opinion was intended to constitute findings of fact and conclusions of law required by rule 52(a) of the Federal Rules of Civil Procedure (Appendix C, infra, 4a). On April 28, 1982, the District Court entered its Order (Appendix D, infra, 16a) wherein judgment was entered in favor of Taylor Machine Works, Inc. and against Philadelphia Lift and Samuel Fertik and Eleanor Fertik in the sum of $48,014.14, and judgment was entered in favor of Taylor Machine Works, Inc., as defendant on the counterclaim, and against Philadelphia Lift and Samuel Fertik and Eleanor Fertik, as plaintiffs on the counterclaim.

A timely appeal from that part of the order by which judgment was entered in favor of Taylor as the defendant on the counterclaim was perfected by Philadelphia Lift by filing a Notice of Appeal on May 25, 1982.

The Court of Appeals heard argument on March 14, 1983. On March 22, 1983, the Court of Appeals affirmed the opinion of the District Court in its Judgment Order (Appendix A, infra, 1a). A petition for rehearing en banc was denied by the Court of Appeals on April 19, 1983. (Appendix B, infra, 3a).

REASONS FOR GRANTING THE PETITION

The question presented by this appeal raises issues which have not yet been decided by the Supreme Court of the United States, but which are of the utmost importance to manufacturers, dealers and consumers in the application, interpretation and enforcement of the Sherman Antitrust Act.

The decision of the Court of Appeals in this case does injustice, not only to the Petitioner, but to all independent dealers who form part of a manufacturer's distribution network, and more importantly, to every consumer of products in the United States. It is submitted that the decision of the Court of Appeals opens a serious gap in the purpose and enforcement of the Sherman Antitrust Act, which threatens the competitive fabric upon which our economy is based.

By permitting a manufacturer to employ the type of vertical, non-price restraint in the manner in which it was employed in the instant case, the Court of Appeals sanctions not only the complete elimination of intrabrand competition within a relevant geographic market, but also a profound change in the traditional concept that the antitrust laws were enacted for the benefit and protection of consumers so as to prevent the taking away from them the advantages which accrue to them from free competition in the market. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). If allowed to stand, approval will have been granted, by the decision of the Court of Appeals, to a manufacturer to prevent consumers, who are in no way involved in a manufacturer's distribution system, from expressing their free choice and right to purchase a product from either of two sellers of the manufacturer's product in a particular relevant geographic market, notwithstanding that both of said sellers have been selected by the manufacturer to sell its product within that relevant geographic market and that both of said sellers are capable of selling and servicing

the product and are equally available to the consumer, except for the restriction.

Inherent in the decision of the Court of Appeals is not only the undisputed legal right of a manufacturer to select its dealers, *United States v. Colgate*, 250 U.S. 300, (1919), and the undisputed right of a manufacturer to agree with its dealers that such dealers will be subject to certain reasonable restraints on the resale of the manufacturer's product, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), but also inherent in the decision is the new precedent that after a manufacturer has selected two or more dealers within a relevant geographic market to sell the manufacturer's product to the consumer, it has the further right to impose different vertical, non-price restraints on each, which discriminate in favor of one dealer and against the other.

It is submitted that no decision of this Court or of any other federal appellate court has ever permitted such restraints, and that the imposition thereof by the manufacturer in this case, wherein all intrabrand competition was foreclosed at the retail level and the petitioner was limited to selling to only one designated customer, while the newly appointed distributor was free to solicit and sell to all other customers in the relevant geographic market, is a novel restraint and a violation of Section 1 of the Sherman Act.

It is further submitted that the restraint employed in this case is just the type of vertical restriction which this Court alluded to in *Continental T.V., Inc., v. GTE Sylvania, Inc.*, supra, at p. 58, where this Court stated ". . . we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition . . ." The instant restraint was so manifestly anticompetitive and had such a pernicious effect on competition, and lacked any redeeming virtue that this is just the type of restraint that should be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm that it

caused or the business excuse for its use. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). The instant restraint, on its face, foreclosed all intrabrand competition at the retail level within a relevant geographic market, was imposed by a manufacturer who would not permit its dealers to sell competing products, and was imposed without any valid business purpose whatever.

Notwithstanding the belief of the petitioner that the restraint employed in this case, and the enforcement thereof, was a per se violation of Section 1 of the Sherman Act, petitioner, at the trial of this matter, presented much evidence that the restraint, if not a per se violation, was a violation under the rule of reason (see Statement, supra, p. 3-4, and Appendix C, infra, p. 5a-6a), because the restraint lacked any redeeming virtue whatever, and had no valid business purposes. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1977). The lower court rejected this contention and instead found that there were redeeming business purposes. One of such redeeming purposes found by the lower court was that Taylor would benefit from Philadelphia Lift's expected future sales of Taylor products to the one customer to which Philadelphia Lift could sell (Appendix C, p. 8a-9a), and that Philadelphia Lift would benefit because it was retaining as its only customer its best Taylor product customer, to whom it had sold, in the previous two years, approximately 80% of all Taylor products sold by Philadelphia Lift (Appendix C, p. 10a). It is submitted that this type of benefit (which is a purely speculative one) is only the promotion of economic self-interest, and as such is not a sufficient justification for a restraint of trade. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 611-12 (1972); *Albrecht v. Herald Co.*, 390 U. S. 145, 151, 154 (1968); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365,

375 (1967). Nor is this the type of redeeming virtue contemplated and enumerated by this Court as being ". . . implicit in every decision sustaining vertical restrictions under the rule of reason." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, supra, p. 54, 55.

The other justification for the restraint found by the court was that Taylor desired to appoint its new distributor as an exclusive distributor (Appendix C, infra, p. 8a, 9a). While such a desire, if it in fact existed, is not illegal, it is also not a redeeming virtue justifying a restraint, but itself is a type of restraint. *ABA Anti-trust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977)*, at Note 9; p. 25; Note 80, (for definitions of exclusive distributorships). Further, since by definition, an exclusive distributorship is one in which a manufacturer agrees to refrain from appointing other distributors within the distributor's exclusive area, Taylor could not have desired to appoint the new distributor as an exclusive distributor, because Taylor also desired to retain Philadelphia Lift as a dealer within the very same area, albeit with the right to sell to only one designated customer. To overcome this definitional problem, (and the fact that the new distributor's contract, as did all of Taylor's dealer agreements except for the restriction agreement with Philadelphia Lift, clearly set forth that the territory assigned to the new distributor was an area of primary responsibility in which the dealer had the non-exclusive right to sell Taylor products; and the fact that the two Taylor employees mainly responsible for the appointment and supervision of the new dealer testified at length, and in answer to lengthy questioning by the District Court that the new dealer was not an exclusive dealer, that Taylor did not desire the new dealer to be an exclusive dealer and that the new dealer never requested an exclusive dealership) the lower court, in its opinion, at various times referred to the new dealership as a dealership exclusive in effect (Appendix C, infra, p. 12a, 13a), and

thus, in effect, carved out the novel theory that within this relevant geographic market, there were two exclusive distributorships, one for the new dealer comprising every customer but one customer, and one for the old dealer comprising only one customer.

It is submitted that the lower court's opinion clearly evidences that its decision in this case was not only without precedent, but utterly confused as to both the facts and the law applicable thereto.

CONCLUSION

For all of the reasons set forth above, and because the ruling below could be exploited by every manufacturer in the United States so as to permit the application of vertical non-price restraints in a discriminatory manner, to the detriment of independent dealers and the consuming public, this petition for a writ of certiorari should be granted.

Respectfully submitted,

By: _____

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1338

TAYLOR MACHINE WORKS, INC.

v.

PHILADELPHIA LIFT TRUCK CORP. and
SAMUEL FERTIK and ELEANOR FERTIK,
his wife

Philadelphia Lift Truck Corporation,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(C. A. No. 79-2552)

Argued March 14, 1983

Before: ADAMS, GARTH and VAN DUSEN, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed for the reasons set forth in the opinion by Judge Shapiro.

Costs taxed against appellant.

Costs taxed in favor of appellee as follows:

Brief	$769.36
TOTAL	$769.56

By the Court:

Circuit Judge

Attest:

Betty J. Robinson, Deputy Clerk

DATED: March 22, 1983
Certified as a true copy and issued in lieu of a formal mandate on April 27, 1983.

Test:

Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1338

TAYLOR MACHINE WORKS, INC.

v.

PHILADELPHIA LIFT TRUCK CORP., et al.

Philadelphia Lift Truck Corporation,

Appellant

(C. A. No. 79-2552)

SUR PETITION FOR REHEARING IN BANC

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, and VAN DUSEN,* *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

DATED: April 19, 1983

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* As to panel rehearing only

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAYLOR MACHINE WORKS, INC.	:	Civil Action
v.	:	
PHILADELPHIA LIFT TRUCK CORP.	:	
AND SAMUEL FERTIK AND	:	
ELEANOR FERTIK, his wife	:	No. 79-2552

APRIL 27, 1982

Copy of Oral Opinion of Honorable Norma L. Shapiro, J.
As Transcribed by Official Court Reporter
At Trial Of The Above-Captioned Matter

THE COURT: Gentlemen, I have reviewed the evidence and your submissions, findings of fact and conclusions of law and the cases that you have cited and that were submitted to me in chambers, particularly those Xeroxes which Mr. Koss was kind enough to submit on behalf of the counter-plaintiff.

In claims on the counter-defendant. In this case on the claim of Taylor Machine Works vs. Philadelphia Lift Truck we have a judgment against Philadelphia Lift Truck and Samuel Fertik and Eleanor Fertik in the amount of $48,014.14 for goods sold and delivered on Counts 1 and 2. There remains to be determined the counterclaim of Philadelphia Lift Truck in its claim against Taylor Machine Works for violation of Section 1 of the Sherman Act. Philadelphia's claim of antitrust violation comprises three counts. Count 1 claims that the March 1978 addendum to its dealership contract with Taylor limiting the dealership to serving one customer, Lavino, constituted a contract with them in restraint of trade.

Count 2 claims that Taylor delayed shipment of goods to Philadelphia which were intended for resale to a customer other than Lavino, that is Phoenix, Markim having been granted a dealership intended to be exclusive but for the Lavino exception. The combination between Taylor and Markim is alleged to violate the Sherman Act.

Count 3 claims that the subsequent termination of Philadelphia's dealership in toto was a result of pressure by Markim constituting a combination or conspiracy with Taylor also in violation of the Sherman Act. Because of serious questions as to liability the trial to the bench was bifurcated. The Court now enters judgment on liability in favor of Taylor, the defendant on the counterclaim.

The facts as stipulated are read into the record and incorporated by reference as if set forth herein, and this opinion is intended to constitute findings of fact and conclusions of law required by Rule 52-A.

The Taylor Machine Works is a Mississippi corporation registered to do business in the Commonwealth of Pennsylvania, with its principal place of business in Louisville, Mississippi.

Philadelphia Lift Truck Corporation is a Pennsylvania corporation with its primary place of business in Philadelphia, Pennsylvania.

Samuel Fertik and Eleanor Fertik are citizens of the Commonwealth of Pennsylvania.

The relevant product market is the sale of heavy duty fork-lift trucks.

The stipulated relevant geographic market is the City of Philadelphia and the Counties of Bucks, Chester, Delaware and Montgomery and the Counties of Burlington, Camden and Gloucester in New Jersey.

The evidence of Taylor's position in that market is limited by reason of Philadelphia's contention it's relying on a per se violation, but there is evidence that it was a

leader; that there were approximately eight manufacturers of heavy duty lift trucks and an estimate by Mr. Fertik that Taylor had 30 percent of the market.

I will first discuss Count 1 with regard to the dealerships. Prior to the addendum of March 1978 Philadelphia maintained a dealership for the sale of heavy duty lift trucks in the relevant geographic area.

This was described as Philadelphia having the relevant geographic area as its area of primary responsibility. There were sales outside the area exclusive by dealers that Taylor had in various locations in the country. Taylor at the time its 50th anniversary publication was issued dealt with a team of direct salesmen in the Southland but not other areas of the United States and Canada through a dealer network in metropolitan areas. With regard to sales outside the area of primary responsibility they were discouraged and unusual. When they occurred there were adjustments of commission if there were servicing by the local dealer. It's undisputed that a manufacturer may include in its marketing strategy restraints designed to improve its overall competitive position as Cernuto establishes. It's not illegal for a manufacturer to enter into contracts that provide dealers exclusive rights to sell the products in designated geographical areas, and Swinn and Continental TV vs. Sylvania are authority for that proposition.

Moreover, it's equally clear and admitted by Philadelphia that a manufacturer can ordinarily stop doing business with dealer "A" and transfer his business to dealer "B" and that such a transfer is legal even though "B" solicited the transaction and even if the transfer is agreed upon prior to the manufacturer's termination of "A." See Ark Dental Supply vs. Cavitron Corporation.

Therefore, if Taylor had unilaterally terminated Philadelphia and transferred a right of exclusive dealership to Markim, no Sherman Act violation would lie for the loss of dealership by Philadelphia. The issues before the Court are, one, does the fact that Taylor carried out

the dealership transfer in two steps, first give the dealership to Markim but for the Lavino account and, two, terminating Philadelphia altogether 90 days later, change the antitrust analysis, and three, was the termination itself illegal.

The parties dispute the type of analysis to be admitted to these issues. In order to resolve them we must first decide whether our analysis will be under the per se or rule of reason standard and our starting point is Sylvania. Sylvania upheld the right of a company to terminate the distributor of its product when the distributor began to sell the product in an outlet outside its allotted territory. The Court adopted the rule of reason standard for analyzing this restriction as to location because it found that Sylvania's exclusive franchising market plan would benefit its competition with other television manufacturers despite the obvious suppression of competition between Sylvania's distributors. It's important to note that Sylvania's decision to market through these locationally exclusive outlets appeared to be a unilateral one taken for the purpose of increasing the market share, a valid business purpose. So-called vertical restrictions therefore are to be analyzed under a rule of reason analysis which balances the effects of vertical marketing strategy on inter-brand and intra-brand competition.

With regard to the addendum Philadelphia argues that the addendum was illegal per se because it constituted a horizontal division of market between itself and Taylor, or between itself and Markim. It bases this claim on the premise that Taylor competed with Philadelphia in this market. However, the record with regard to competition by Taylor with Philadelphia is not persuasive. The evidence of sale of so-called national accounts in the geographic area was not substantial. This case is unlike Holman Motors vs. Chrysler Corporation in which the manufacturer subsidized its partially and wholly owned

dealers competing at the retail level with independent dealers; nor as a vertical marketing arrangement are Taylor's actions unlawful but the rule of reason for the addendum must be placed in context. Taylor's desire to have Markim as its exclusive dealer was based on legitimate business reasons. Most important of which were the lack of sales success of Philadelphia as its dealer. In the years 1976 and '77 Philadelphia sold only 16 fork lifts, of which 13 were to Lavino, and only 10 in the Philadelphia area of primary responsibility. It had some success selling replacement parts but its payments had been slow and Markim in contrast was a large corporation with success in crane sales and rentals. Markim had a larger, more technically competent sales force and sufficient capital to place an initial order for nine lift trucks. There were occasions with regard to payments for replacement parts that resulted with Philadelphia being placed on credit probation and Taylor had reason to believe that Philadelphia was undercapitalized. Perhaps it was for this reason that Philadelphia's stocking of demonstration models was not to Taylor's satisfaction although it must be added that the fork-lift rental business of Philadelphia provided demonstration models when required. However, this was to be contrasted with Markim's ability which operated in favor of having Markim as the dealer.

It would be unrealistic to assert that Philadelphia was permitted to retain the Lavino account after the addendum as a matter of compassion. It seems clear that this was in the interests of Taylor in view of the fact that Philadelphia's only success was in selling to Lavino, but it seems equally unrealistic to portray Philadelphia as an equal to Markim. Taylor was not concerned so much with intra-brand competition in this matter as its competitive position in the sale of its products in the market altogether. That determination to improve its competitive position in the relevant geographic market predated the addendum and violates no antitrust law.

Taylor then had a legitimate business purpose in seeking an exclusive dealership. Its accommodation to Philadelphia with regard to the one customer, Lavino, as it transferred an exclusive dealership was not an attempt to limit competition between parties that were heretofore competitive. Philadelphia has not proved nor does it argue that Markim conspired with Taylor to impose the addendum on Philadelphia.

It's possible that there was to be a 90-day limit even on the Lavino account Philadelphia was permitted to retain to accommodate Markim, but there is no testimony that such a limitation was at the insistance or even at the request of Markim and the documentary evidence, the postscript on papers copied of Wages' letter to Markim is not illuminating in the absence of any recollection concerning it by the Taylor people involved. Markim was not a party and there was no testimony from Markim officials involved in these events. It's possible and was permissible for Taylor to believe, given Philadelphia's sales record, that the intra-brand marketing scheme that they determined upon in March of 1978, one dealer, one customer, was best suited to maximize Taylor's position in the inter-brand market.

Philadelphia concedes that Taylor could have lawfully terminated its dealership in Philadelphia, but instead renegotiated the contract to provide this addendum which did not create intra-brand competition, but did not interfere with competition that had existed prior thereto. This addendum was the product of understandably unequal bargaining positions between Taylor and Philadelphia, and it's understandable that Philadelphia enter into it reluctantly in order to keep the Lavino account, but Philadelphia's reluctance in entering into the contract doesn't make it violative of the antitrust laws.

In this way the case resembles Carlo C. Geladi vs. Miller Brewing Company in which the manufacturer contracted to create a distributorship in an area in which

it was already bound by an exclusive dealership contract with the defendant. The court rejected the plaintiff's number one claim on the ground that absent unlawful intent the manufacturer could have cut off the dealership without notice under the contract. In fact the manufacturer did less. It established a dual dealership and then allowed the plaintiff to sign a non-competition covenant with the new dealer for a substantial sum. The court concluded that the manufacturer's actions were clearly less damaging to the plaintiff than a complete cut-off, and did not violate the Sherman Act.

I would add that in considering the purpose and effect of the March addendum the Court relied on the documentary evidence because it seemed to the trier of fact that the original testimony of Taylor's Wages and Bayer was inconsistent with the plain meaning of their own letter admitted in evidence. Their recollection of events in the years prior to 1978 when contrasted with their almost lack of recall of the critical events of 1978 concerning the controversy and their demeanor on the witness stand convinced the Court they were lacking in credibility.

I have already commented that the testimony of Mr. Fertik that he agreed to the March addendum reluctantly is irrelevant in view of the circumstances that clearly made it more advantageous for him to keep his business, indeed almost his only Taylor customer for fork lift purchases, than to lose what had been theretofore a dealership exclusive in effect.

The Court finds no violation of the Sherman Act by reason of the addendum of March 8 which in a situation where Markim had not been competing with Philadelphia prior to that time, created a situation in which Markim would sell Taylor fork lifts in the relevant areas to all customers but for Lavino and Philadelphia could sell fork lifts to Lavino only.

With regard to Count 3, the termination in June Philadelphia contends that the termination even as to

Lavino in June must be analyzed under the per se rule for although exclusive dealerships seems to fall under the Sylvania rule of reason approach for vertical marketing arrangements, this termination was actually instigated by Markim because Philadelphia was allegedly underpricing Markim and its impact was felt horizontally by Taylor's distributors. The legal basis for Philadelphia's claim is found in Cernuto. Cernuto involved the termination of the plaintiff, a dealer, which for purposes of reviewing a summary judgment motion the court reversing it had to assume was caused by the complaint of a competing defendant dealer motivated by direct price competition between it and the terminated dealer. On those facts the court held that a per se violation was possible for two reasons. One, as the termination was initiated by the competing dealer, not the manufacturer, the effect was to eliminate intra-brand competition and not as in Sylvania to promote inter-brand competition, and, two, equally important, the motivating factor in the dealer's efforts was price. Here there is evidence from which it may be inferred that Philadelphia's ultimate complete termination was in part caused by complaints of Markim. A causal relationship between competitor complaint and the termination is a necessary first step to proving a Section 1 violation as Sweeney makes clear. However, the mere receipt of complaints is insufficient to prove a causal nexus. That such a nexus exists on these facts, given the many good reasons for terminating Philadelphia such as its poor sales record and its admitted amounts owed to Taylor, it cannot be said that Markim's complaints were a "but for" cause of the termination. If the defendants demonstrate that the manufacturer's actions were not motivated solely by price, then the per se rule might be inappropriate as was acknowledged in the Cernuto case.

Nonetheless, if Markim caused the termination in the view of the Court this case is not governed by Cernuto. First as the Court noted in distinguishing

Packard Motor Car Company, the complaining dealer in Cernuto sought to fix prices, a classic antitrust per se violation. He was not an exclusive dealer nor did he seek such a position, but Markim sought to secure an exclusive franchise, a marketing strategy which the Cernuto court conceded might have some or all competitive advantages.

Second, Taylor had also what was in practical effect an exclusive dealer strategy in this relevant market; and since notwithstanding some testimony about pricing being a motive from Mr. Fertik, in the view of the Court Philadelphia has proved no price motivation behind Markim's complaint. That makes this case closer to Sylvania.

I note in passing as a footnote that Philadelphia did complain in the past of non-enforcement of exclusivity in this geographic area and seems to have conceded when the shoe was on the other foot that there were some advantages at least to the dealer in having an exclusive relationship to avoid confusion and for financial benefit.

It is my view that a rule of reason analysis under Sylvania is appropriate to this case balancing the effect of intra-brand competition with the positive effects of intra-brand competition because of the lack of proof of pricing considerations in the Markim complaints or the Taylor reaction.

Third, in Cernuto the manufacturer breached a dealership contract entered into on three months previously whereas here Taylor was terminating a contract according to its terms, had a right of termination on 30-days' notice, and finally, the actions of Taylor did not contradict its economic self-interest which is recognized as a factor in Sweeney.

The cases on which Philadelphia relies are inapposite.

American Motors vs. Holiday Inn involved rejection of a franchise application by the parent corporation at

the instigation of three existing franchisees who were also potential competitors. That decision clearly reduced intra-brand competition with no discernible intent to improve inter-brand competition. This case involves the replacement of one, in effect, exclusive dealer with another.

Nor is this case like Pitchford vs. Pepi where the manufacturer enforced and policed a territorial division of its market for the benefit of its dealers. The court found this to be a horizontal restraint and a per se violation. The court noted that this vendee restriction was part and parcel of a comprehensive price fixing scheme. No such price fixing was proved in this case. The Lavino exception in the Philadelphia addendum and the Markim agreement was not part of the general vendee restriction marketing scheme, but an accommodation to Philadelphia in terminating what had been and remained in essence a transfer of exclusive dealership.

Muko vs. Southwestern Pennsylvania Building and Construction Trades Council having dealt with the fact that the labor exception did not apply applied a rule of reason analysis which the court views as allegeable to the facts of this case.

In the Libarati case, that is distinguishable as a clear market division case in an area where no exclusive dealership existed. Eiberger vs. Sony Corporation is also distinguishable as it involved an illicit attempt to prohibit exclusive dealers from penetrating each other's geographic market. The Eiberger case recognized that the rule of reason applied, not the per se rule. The significance of the Eiberger case is that it held that because a practice is not per se unlawful does not mean it is per se lawful; but it does not stand for the proposition that a per se analysis must be applied rather than the rule of reason. It is the rule of reason analysis we apply here with a different result.

Under the rule of reason analysis this termination was lawful because the plaintiff hasn't proved the necessary anticompetitive effects as to a particular commodity in a relevant market. The stipulated market, the area of primary responsibility, was the City of Philadelphia, the Counties of Bucks, Chester, Delaware, Montgomery in Pennsylvania, and the Counties of Burlington, Camden and Gloucester in New Jersey.

There is no evidence that Taylor has achieved dominance or has the potential to achieve market dominance in the sale of fork-lift trucks by virtue of this exclusive dealer marketing strategy; and the redeeming procompetitive virtues of the strategy as acknowledged by Sylvania precludes a finding of an unreasonable restraint of trade, at least on the record the plaintiff has created.

Philadelphia of course had the burden of proving anticompetitive effect and that it failed to do. Indeed in fairness Philadelphia did not attempt to do so but relied entirely as acknowledged in opening statements on the applicability of the per se rule.

Replacing one distributor with another doesn't reduce existing intra-brand competition, and there is no evidence that Philadelphia was ever a competitor of Markim with respect to Taylor Fork Lift either as to Lavino or any other Taylor customer.

Finally, with regard to the Phoenix sales, Count 2, the most credible witness, Mr. Duffner of Phoenix, testified that he called Taylor regarding the delay in shipment of the trucks he ordered from Philadelphia, that Taylor, Mr. Wages on behalf of Taylor denied knowledge of an order by Philadelphia of two lift trucks for Phoenix and sent him to Markim as the Taylor dealer. Philadelphia ultimately agreed to cancel Phoenix's purchase orders without charge, although it did so reluctantly to assure Phoenix the Taylor trucks that Phoenix wished to purchase, and to protect Philadelphia's continued ability

to deal with Taylor on the limited basis contemplated by the March addendum.

Philadelphia has not met its burden of proving that Markim caused this cancellation. In other words, we find here unilateral action on the part of Taylor which does not fall within Section 1 of the Sherman Act.

Even if Markim's complaints about its lack of a completely exclusive dealership were a cause in part of the cancellation, there would be no antitrust violation because Taylor had independent reason for appointing an exclusive dealer and requesting or requiring distribution of its product through its recognized area dealer.

For those reasons I am compelled to find that no violation of Section 1 of the Sherman Act has been established in Counts 1, 2 or 3 under defendant's counterclaim and therefore I will enter judgment on the counterclaim in favor of the plaintiff.

I will give you the usual time for any usual post-trial motions.

MR. KOSS: Thank you, Your Honor.

MR. RYAN: Thank you, Your Honor.

THE COURT: Good afternoon.

(Adjournment at 1:08 p.m.)

APPENDIX D

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TAYLOR MACHINE WORKS, INC.	:	Civil Action
	:	
v.	:	
	:	
PHILADELPHIA LIFT TRUCK CORP.	:	
AND	:	
SAMUEL FERTIK AND ELEANOR	:	
FERTIK	:	
	:	No. 79-2552

CIVIL JUDGMENT

Before Honorable Norma L. Shapiro

AND NOW, this 27th day of April 1982, in accordance with the Verdict of the Court

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff Taylor Machine Works, Inc. and against the Defendants Philadelphia Lift Truck Corp. and Samuel Fertik and Eleanor Fertik in the sum of $48,014.14, it is

FURTHER ORDERED that judgment is hereby entered in favor of Taylor Machine Works, inc., as the Defendant on the counterclaim, and against Philadelphia Lift Truck Corp., Samuel Fertik and Eleanor Fertik, Plaintiff on the counterclaim.

By the Court:

Attest: Ellen N. Starr
Deputy Clerk

No. 83-58

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PHILADELPHIA LIFT TRUCK CORP.,
Petitioner

v.

TAYLOR MACHINE WORKS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE PETITION

Point I — This Case Does Not Involve Any Special Or Important Reason Which Would Warrant The Exercise Of This Court's Discretion In Granting The Writ of Certiorari.

The particular market situation which existed prior to the termination of Philadelphia Lift Truck Corporation as a distributor of products manufactured by Taylor Machine Works, Inc., was highly unusual.* Indeed, research has failed to reveal any reported case which involved facts which were closely analogous to the facts involved here. Thus, the present case does not have any implications to the enforcement or interpretation of the Sherman Act. Petitioner has failed to assert any other factors which would warrant review by this Court. (U. S. Sup. Ct. Rule 19.)

In the present case the lower court, sitting without a jury, heard testimony that demonstrated that Taylor Machine Works was quite dissatisfied with the performance of Philadelphia Lift Truck as a Taylor dealer. In particular, the lower court specifically found that, "Taylor had reason to believe that Philadelphia was undercapitalized." (Appendix C, 8a.) Moreover, there was a continuing problem with respect to the payment by Philadelphia Lift Truck for parts purchased from Taylor. It was stipulated by the parties to this action that Philadelphia Lift Truck had been placed on a C.O.D. basis by Taylor on at least three occasions prior to 1978. Despite repeated assurances by Philadelphia Lift Truck that the parts account would be kept current, this payment delinquency problem persisted. With regard to the success of Philadelphia Lift Truck in the sales of Taylor fork-lift trucks, in 1976 and 1977 Philadelphia Lift Truck ordered 16 fork-lift trucks from Taylor, of which 13 were to

*Taylor Machine Works, Inc., respondent in these proceedings, is not owned by any parent corporation, nor does it have an ownership interest in any subsidiaries, nor does it have any corporate affiliates.

a single account, Lavino Shipping Company. (Appendix C, 8a.) The lower court confirmed that Taylor had good reason to be dissatisfied with the performance of Philadelphia Lift Truck and that this dissatisfaction was the prime reason for seeking to appoint Markim Equipment Company as its dealer in this area: "Taylor's decision to have Markim as its exclusive dealer was based on legitimate business reasons. Most important of which were the lack of sales success of Philadelphia as its dealer." (Appendix C, 8a.)

Thus, this was the situation confronting Taylor in November 1977, when it was contacted by Markim Equipment Company, a large crane dealer in the Philadelphia area. At that time Markim inquired into the possibility of becoming a distributor of Taylor's products. An investigation was made by Taylor into the background of Markim. Taylor learned that Markim had a large, technically-competent sales staff, that Markim was well capitalized, and that it carried other equipment lines which were compatible with Taylor fork-lift trucks. (Appendix C, 8a.) Thus, Taylor was quite favorably disposed towards the appointment of Markim as its new dealer in the Philadelphia area because of these obvious marketing advantages which Philadelphia Lift Truck did not possess.

There is no dispute between the parties that Taylor could have terminated Philadelphia Lift Truck in March 1978 simply by giving the 30-days' notice provided in the dealership agreement. Taylor could then have assigned the entire Philadelphia area to its new dealer, Markim. However, rather than exercising that option, Taylor offered Philadelphia Lift Truck the opportunity to remain as a Taylor dealer. As stated in the March addendum, all territory previously assigned to Philadelphia Lift Truck would be withdrawn with the exception of the Lavino account. In addition, Philadelphia Lift Truck could continue to purchase parts and could purchase trucks for its rental fleet. Shortly after the addendum was sent to Philadelphia Lift Truck for execution, Taylor sent a dealership agreement to Markim for execution.

Philadelphia Lift Truck had the option of not signing the addendum, in which case the relationship with Taylor would have been terminated. Philadelphia Lift Truck could then have sought to obtain a new line of heavy-duty, fork-lift trucks to sell, or it could have concentrated its efforts on selling a different, smaller line of fork-lift trucks. Philadelphia Lift Truck nevertheless chose to sign the addendum. Thus, Taylor hoped that the net result of the addendum and the subsequent appointment of Markim as a Taylor dealer would be greater efficiency in the distribution of Taylor products in the Philadelphia area. Markim was expected to achieve the market penetration that Philadelphia Lift Truck was unable to supply, while at the same time Philadelphia Lift Truck could continue to solicit sales from Lavino, at which Philadelphia Lift Truck had demonstrated that it could be highly successful in its sales effort. The lower court specifically found: "It's possible and was permissible for Taylor to believe, given Philadelphia's sales record, that the intrabrand marketing scheme that they determined upon in March of 1978, one dealer, one customer, was best suited to maximize Taylor's position in the interbrand market." (Appendix C, 9a.)

In summary, the "one dealer, one customer" situation which existed after the execution of the addendum to the dealership agreement in March 1978 was a legitimate, albeit unusual, response to the market situation which existed in the Philadelphia area at that time. This case does not have any implications for the enforcement of the antitrust laws because the same set of circumstances may never arise again.

Point II — The Decision Of The Lower Court Is Founded Upon Findings Of Fact Which Should Not Be Set Aside Unless "Clearly Erroneous".

The granting of review would also be inappropriate because the lower court, sitting without a jury, rendered certain findings of fact which should not be disturbed on appeal unless "clearly erroneous". *Inwood Laboratories*,

Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982). In addition to its finding that Taylor had legitimate business reasons for entering into the addendum in March 1978 and in terminating Philadelphia Lift Truck in June 1978, the lower court also specifically found that Philadelphia Lift Truck had failed to demonstrate that its termination as a Taylor dealer was brought about by pressures and complaints received by Taylor from the competing dealer, Markim. If review were to be granted, the entire record below would have to be perused in order to determine whether this Court is left with the "definite and firm conviction that a mistake has been committed." 456 U.S. at 855.

In its bench opinion the lower court found that Philadelphia Lift Truck had failed to establish that there was a causal relationship between any acts on the part of Markim Equipment Company and the termination of Philadelphia Lift Truck as a Taylor dealer. Specifically, the court stated:

> A causal relationship between competitor complaint and the termination is a necessary first step to proving a Section I violation as *Sweeney* makes clear. However, the mere receipt of complaints is insufficient to prove a causal nexus. That such a nexus exists on these facts, given the many good reasons for terminating Philadelphia such as its poor sales record and its admitted amounts owed to Taylor, it cannot be said that Markim's complaints were a "but for" cause of the termination. (Appendix C, 11a.)

The lower court's holding in this regard was consistent with, and made specific reference to, the Third Circuit's decision in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911. However, there was one major distinction between *Sweeney* and the instant case. In *Sweeney* the district court directed a verdict against appellants after

the close of all of the evidence. In the instant case the district court sat without a jury, and, thus, its finding of no causal relationship between the complaints and the termination is entitled to even greater weight than the lower court decision in *Sweeney*.

With regard to the cancellation in April 1978 of an order for two Taylor fork-lift trucks obtained by Philadelphia Lift Truck for shipment to Phoenix Steel, Philadelphia Lift Truck attempted at trial to convince the lower court that Taylor intentionally delayed shipment of these two trucks to Phoenix Steel and conspired with Markim to divert the sale from Philadelphia Lift Truck to Markim. However, the lower court specifically held that, "Philadelphia has not met its burden of proving that Markim caused this cancellation. In other words, we find here unilateral action on the part of Taylor which does not fall within Section I of the Sherman Act." (Appendix C, 15a.)

Philadelphia Lift Truck called no witnesses at trial who were associated with Markim. Thus, there was no evidence that Markim was even aware of the sale by Philadelphia Lift Truck to Phoenix Steel prior to the time when Markim was contacted by the purchasing agent for Phoenix Steel. In short, there was no compelling evidence to support the finding of a conspiracy between Markim and Taylor regarding the cancellation of this order. Philadelphia Lift Truck had the burden of proof on this issue, and the trial court correctly found that Philadelphia Lift Truck had failed to satisfy this burden. In any event, the conclusions of the trial court in this regard are certainly not "clearly erroneous", and, thus, this would not be an appropriate case for review by this Court.

Point III — The Lower Court Properly Applied A "Rule-Of-Reason" Analysis To These Transactions, And Further Properly Concluded That Petitioner Failed To Demonstrate A Substantial Impact On Or A Restraint

Of Trade Affecting *Interbrand* Competition In The Particular Product Market.

Petitioner asserts that, "The instant restraint was so manifestly anticompetitive and had such a pernicious effect on competition, and lacked any redeeming virtue that this is just the type of restraint that should be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm that it caused or the business excuse for its use." (Petitioner's Brief, 9-10.) The lower court duly considered this argument by appellant and rejected it. The lower court properly concluded that the case was governed by this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and that under *Sylvania* a rule-of-reason analysis was required. (Appendix C, 7a).

The most glaring omission in this argument by petitioner in support of the application of a per se rule is its failure to categorize this particular agreement in any of the judicially-recognized per se categories such as price fixing, horizontal division of markets, etc. Instead, petitioner is arguing in favor of an "ad hoc" application of the per se rule. However, this Court has consistently warned that additions to the limited per se list are not to be made on an ad hoc basis. For example, in *White Motor Co. v. United States*, 372 U.S. 253 (1963), this Court considered the legality of a vertical territorial restraint. In rejecting the application of the per se rule at that time, this Court stated:

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practical means a small company has for breaking into business . . . and within the "rule of reason". We need to know more than we do about the actual impact of these

> arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" . . . and therefore should be classified as per se violations of the Sherman Act. 372 U.S. at 263.

See also, *United States v. Topco Associates*, 405 U.S. 596, 607-08 (1972); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977).

Petitioner has not referred this Court to any "body of judicial experience" dealing with "one-customer restrictions". Indeed, as noted above, this case, in which a dealership agreement was modified so as to assign the dealer a single customer, may well be unique in the United States. However, it must be recalled that this "single customer" represented approximately 75% of the sales made by petitioner over a four-year period. In light of the success experienced by Philadelphia Lift Truck with this single customer, as contrasted with the lack of any real penetration in the remaining Philadelphia market, the lower court properly concluded that it did not have sufficient information and experience to conclude that this type of agreement should be labeled as a per se violation of the Sherman Act. In the absence of any prior experience as to the effect of this type of arrangement on competition, the lower court correctly applied a rule-of-reason analysis to this particular case.

Having thus concluded that the rule of reason would apply in this situation, it was then necessary for the court to determine whether Philadelphia Lift Truck had proved a substantial impact on or a restraint of trade affecting interbrand competition in this particular product market. However, the lower court found that the record was totally devoid of any such evidence. The Third Circuit's decisions in *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), and *Franklin Music Co. v. American Broadcasting Companies, Inc.*, 616 F.2d 528 (3d Cir. 1979), make it clear that

there must be a showing of an anticompetitive effect on interbrand competition in order to make out a case under the rule of reason. See also, *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1006 (5th Cir.), cert. denied, 454 U.S. 1080 (1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), cert. denied, 446 U.S. 965 (1980).

Since petitioner failed to demonstrate any anticompetitive effects on interbrand competition, and since there were legitimate business reasons to support the decisions made by Taylor regarding Philadelphia Lift Truck, the decision of the lower court was manifestly correct, and, thus, review should not be granted by this Court.

CONCLUSION

For the foregoing reasons, as well as any additional reasons set forth in the district court's opinion, which was affirmed per curiam by the Third Circuit Court of Appeals, respondent, Taylor Machine Works, Inc., respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

GERMAN, GALLAGHER & MURTAGH

By _____

Philip A. Ryan
Attorney for Respondent,
Taylor Machine Works, Inc.